

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEANNINE MALIN)	
Claimant)	
)	
VS.)	
)	
ROOKS COUNTY SENIOR SERVICES)	
Respondent)	Docket No. 1,047,802
)	
AND)	
)	
FIRSTCOMP INSURANCE CO.)	
)	
and)	
)	
EMC INSURANCE CO.)	
Insurance Carriers)	

ORDER

Claimant requests review of the April 27, 2010 preliminary hearing Order entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson.

ISSUES

Claimant alleges she injured her low back on September 25, 2006, and each day she worked afterwards through sometime in March or April 2008, when she ended her employment with the respondent, Rooks County Senior Services, Inc.¹ Claimant also alleges she injured her neck and left shoulder on February 24, 2008, while working for the respondent.

¹ Claimant testified the nursing home where she worked was initially owned by Rooks County and, therefore, named the Rooks County Nursing Home. But the name was later changed to Red Bud Village upon a change of ownership. At this juncture the parties have not made the identity of the employer an issue.

The SALJ found that claimant had failed to prove she sustained a repetitive trauma injury to her back and, therefore, the SALJ determined the appropriate date of accident for claimant's back injury was September 25, 2006. Consequently, the SALJ denied claimant workers compensation benefits for the alleged back injury as claimant failed to timely file an application for hearing. The SALJ, however, awarded claimant benefits for her February 24, 2008, accident.

Claimant maintains she sustained a repetitive trauma injury to her low back and, therefore, her low back injury continued until she left respondent's employment in March or April 2008. She summarized her argument, as follows:

It is claimant's contention that since claimant's testimony was uncontroverted and the medical opinions of Dr. Murati and Dr. Manguoglu were uncontroverted and all of this was believable and substantial testimony, Special Administrative Law Judge C. Stanley Nelson was in error to deny claimant's request for temporary total disability benefits at the conclusion of her unemployment and in denying claimant's request for treatment for her back condition as well as in denying the payment of claimant's outstanding medical bills. It is claimant's contention that this is a repetitive traumatic injury case for both the cervical and lumbar spine and that both should be treated as work related conditions arising out of and in the course of employment through her last date of employment through February 25, 2008 and thereafter.²

Accordingly, claimant requests the Board modify the preliminary hearing Order to award her benefits for her alleged back injury.

EMC Insurance Co. (EMC), which provided respondent with workers compensation insurance coverage through December 2006, contends claimant's back injury resulted from a single, distinct episode and, therefore, she did not timely file an application for hearing as required by K.S.A. 44-534(b). In the alternative, EMC argues that any repetitive trauma injury to the low back would have extended well into 2007 and 2008, when respondent had a new insurance carrier. In summary, EMC contends it has no additional liability for claimant's September 2006 low back injury. But if claimant did sustain repetitive trauma injury to her low back through sometime in March or April 2008, EMC argues FirstComp Insurance Company (FirstComp) should be responsible for such injury as it was respondent's workers compensation insurance carrier from January 2007 through December 2008. Accordingly, EMC requests the Board affirm the preliminary hearing Order.

FirstComp likewise maintains that claimant sustained two separate and distinct accidents and, therefore, the preliminary hearing Order should be affirmed. FirstComp

² Claimant's Brief at 2 (filed May 24, 2010).

contends that any flare-ups of back pain that claimant experienced after September 2006 were only temporary.

The SALJ ordered FirstComp to provide claimant benefits for her cervical and left shoulder symptoms. That portion of the Order is not challenged. The only issues presented to the Board on this appeal pertain to claimant's alleged back injury and those issues are:

1. Did the SALJ err by finding claimant injured her low back in a single incident on September 25, 2006, rather than by alleged repetitive trauma while working for respondent through sometime in March or April 2008?
2. If claimant injured her low back at work from repetitive trauma, what is the date of accident?
3. Did claimant file a timely application for hearing for her low back injury as required by K.S.A. 44-534(b)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

The claimant was employed at a Rooks County nursing home in its laundry and housekeeping department. On September 25, 2006, claimant bent over while unloading clothes from a dryer and experienced a sharp pain in her lower back that went down into both legs. Claimant promptly reported the incident to her supervisor.

After missing several days from work, claimant returned to her regular job duties. Back at work claimant's low back pain allegedly worsened causing her to miss work on occasion. Several weeks during 2007 claimant only worked part-time due to her low back symptoms. But needing additional money, claimant returned to full-time.

On February 24 or 25, 2008, claimant experienced another incident at work. This time she felt a sharp pain in her neck, left shoulder and arm while pulling clothes from a front-load washing machine. Claimant immediately reported the incident to a supervisor. That night claimant sought treatment at an emergency room. Only days before the February 2008 incident claimant was examined by Dr. William D. Kossow and reported that she had developed some neck pain and numbness in her left arm. The doctor performed electrodiagnostic studies, which indicated claimant had bilateral carpal tunnel syndrome. Claimant also reported to Dr. Kossow about her ongoing low back complaints for which the doctor recommended possible therapy and an injection.

After the February 2008 incident, claimant missed a month or more of work. FirstComp represents that following the February 2008 incident it paid temporary total disability benefits until March 23 and then again from May 12 through June 24, 2008.³

The claimant indicated at the preliminary hearing in January 2010 that she believed the February 2008 incident worsened her low back pain. She also indicated the work she performed following that incident aggravated her lower back. But at her deposition in November 2009, claimant testified the only pain she felt at the time of the February 2008 incident was the pain in her neck and arm.⁴ Moreover, the report claimant prepared in March 2008 does not mention that she experienced back pain during the February 2008 incident.⁵

Following the September 2006 incident, claimant consulted her personal physician, Dr. Jennifer Brull. The doctor initially prescribed pain medications, a cortisone steroid injection in the low back, and several weeks of physical therapy. In June 2007, claimant had an epidural steroid injection in her lower back. Dr. Brull also referred claimant to others for treatment and tests. Claimant was sent to Dr. Ali Manguoglu, a neurosurgeon, in September 2007, and he diagnosed low back and left-sided sciatica secondary to lumbar spinal stenosis at L2-3, L3-4, and a disc bulge at L2-3. In November 2007, he suggested lower back surgery.

Claimant obtained a second opinion from Dr. Gery Hsu, a neurosurgeon, who examined claimant in October 2007 and determined she was not a candidate for lumbar surgery. He did recommend she change occupations and minimize further injury to her spine by avoiding high impact activities such as “running and jumping, heavy lifting and twisting”.⁶ The doctor noted claimant’s work activities aggravated her low back symptoms, which would significantly improve whenever she was away from work.

Dr. Manguoglu ultimately restricted claimant’s work activities and recommended surgery on her neck. On May 12, 2008, Dr. Manguoglu wrote Dr. Brull and advised, in part:

It is my neurosurgical opinion that the findings on her cervical myelogram and post-myelogram CT scan is obviously preexisting in relation to the incident of 02/24/2008 however I believe that there has been aggravation of this condition with the incident at work on 02/14/2008. She is performing her regular duties at the present time but she has increasing back, neck and left arm pain after work so I believe that her

³ P.H. Trans. at 131-132.

⁴ Claimant’s Depo. at 46.

⁵ P.H. Trans., Cl. Ex. 14 (Accident report dated Mar. 12, 2008).

⁶ *Id.*, Cl. Ex. 11 at 4 (Dr. Hsu’s Oct. 9, 2007 report at 1).

activities do indeed aggravate her spinal condition which is significant in the cervical spine.⁷

When the nursing home was unable to accommodate claimant's work restrictions, claimant left work and began receiving weekly workers compensation benefits from FirstComp. Claimant believes she last worked at the nursing home in the Spring of 2008.⁸

At her attorney's request, claimant was evaluated by Dr. Pedro A. Murati. The doctor examined claimant in November 2009 and diagnosed low back pain secondary to left sacroiliac joint dysfunction, neck and shoulder pain from cervical radiculopathy, and left cubital tunnel syndrome, all of which the doctor found to be a "direct result from the work-related injury that occurred on 9-25-06 and each day worked thereafter through but not necessarily ending on or about 02-25-08."⁹ The history recorded by Dr. Murati fails to note that claimant experienced any back pain at the time of the February 2008 incident.

The SALJ determined the date of accident for claimant's low back injury was September 25, 2006. The undersigned agrees. Although claimant's work activities after September 2006 aggravated her symptoms, the evidence does not establish the work was causing any additional injury. The evidence is overwhelming that claimant's work aggravated her back but that she would have significant improvement away from work. Stated differently, the evidence establishes claimant's work after September 2006 caused only a temporary aggravation of her symptoms. It does not appear that the February 2008 incident aggravated claimant's low back symptoms at all. The undersigned is not persuaded at this juncture by Dr. Murati's opinion on the cause of claimant's low back complaints as it is rather generic in nature and not supported by any detail or explanation.

In January 2007, EMC wrote claimant and advised it was closing the workers compensation claim on the September 2006 accident. The letter also indicated it appeared that all of the related medical bills had been paid and that the insurance carrier would not be responsible for any additional medical treatment or other benefits. Linda L. Smith, a senior workers compensation claims adjustor, testified that EMC did not pay claimant any temporary total disability compensation for the September 2006 accident but the company did provide medical benefits. And the last payment of those benefits was made in April 2007 for drugs. The date those drugs were prescribed, purchased, or provided is not clear from this record.

Claimant delayed until October 2009 to file an application for hearing regarding her low back injury. That is more than three years after the September 25, 2006, accident and

⁷ *Id.*, Cl. Ex. 10 at 2 (Dr. Manguoglu's May 12, 2008 report at 1).

⁸ *Id.* at 57-58.

⁹ *Id.*, Cl. Ex. 2 at 4 (Dr. Murati's Nov. 18, 2009 IME Report).

more than two years after the nursing home and EMC last provided claimant with medical benefits for that injury. Accordingly, claimant has not complied with K.S.A. 44-534(b), which provides:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for hearing is on file in the office of the director within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.¹⁰

In summary, claimant's application for hearing regarding her low back injury is untimely and claimant is now barred from pursuing additional benefits for that injury. The preliminary hearing Order should be affirmed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹²

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated April 27, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and EMC Ins. Co.
Joseph R. Ebbert, Attorney for Respondent and First Comp Ins. Co.
C. Stanley Nelson, Special Administrative Law Judge
Bruce E. Moore, Administrative Law Judge

¹⁰ K.S.A. 44-534(b).

¹¹ K.S.A. 44-534a.

¹² K.S.A. 2009 Supp. 44-555c(k).